

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

PC. CRIMINAL APPEAL NO. 5 OF 2023

(Appeal from the decision of the District Court of Babati at Babati in Criminal Appeal
No. 38 of 2022)

SIMON MALKIAD.....APPELLANT

VERSUS

EMANUEL MALKIAD.....RESPONDENT

JUDGMENT

Date: 24/3/2023 & 11/5/2023

BARTHY, J.

Emanuel Malkiad, the respondent herein together with Leonald Timotheo, who is not a party to the present appeal were arraigned before Dareda Primary Court (hereinafter referred as the trial court) for one count of malicious damage to property, contrary to Section 326(1) of the Penal Code [CAP 16 R.E 2022].

It was alleged before the trial court that; the respondent and his co-accused did unlawful cut down one eucalyptus tree which is the property of the appellant herein.

The respondent and his co-accused pleaded not guilty to the offence, hence full trial ensued which at the end the respondent was convicted and sentenced to pay fine of Tsh. 50,000/= or serve five months' imprisonment in default of the fine. The co-accused was found not guilty and therefore acquitted forthwith.

The respondent aggrieved with conviction and sentence meted against him, he preferred an appeal before the District Court of Babati (hereinafter referred to as the district appellate court). Subsequently to the hearing of the said appeal, the district court quashed the conviction and set aside the sentence meted against the respondent.

The appellant was not amused with the decision of the district appellate court; hence he preferred the instant appeal with two grounds as follows;

- 1. That the district court erred in law and facts by reversing the trial court's decision basing on unwarranted reasons and inferences born(sic) from misinterpretation of the laws.*
- 2. That the district court erred in law and facts for its own misdirection (sic) on the offence at hand and*

forthwith invoking (a) another offence (sic) unto which it labored (sic) to deviate from the matter at hand an invented suo motto [sic] the issue of land ownership as a core factor in the offence of criminal trespass.

The appellant therefore prayed for the decision of the district court to be quashed and set aside the decision of the trial court be restored.

At the hearing of the appeal Mr. Festo Jackson learned advocate represented the appellant, while the respondent appeared in person. the appeal was disposed of by written submission.

Submitting on the first ground of appeal Mr. Jackson faulted the district court for quashing the trial court's decision because it was not reasonable nor supported by the evidence adduced before the trial court.

It was further submitted that parties to the instant appeal are siblings and they lived under control of their father. The appellant claimed to have planted trees for his use. He also added that the issue of land ownership between the parties herein was settled in the year 2017.

It was Mr. Jackson's argument that before the trial court the appellant had tendered documentary evidence to establish ownership of the tree. To buttress to his argument, he cited the case of **Julius Malobo v. Revocatus Msiba & another**, PC Criminal Appeal No. 3 of 2020 (unreported) which elaborated on the ingredients of the offence of malicious damage to property as follows;

- i. He owns the property or properties,*
- ii. That the said property(ies) has or have been destructed or damaged,*
- iii. That the same was damaged or destructed by the accused person and*
- iv. The act of so damaging or destructing must have been actuated by malice.*

Mr. Jackson went further to argue that, according to the evidence adduced before the trial court, the appellant had proved the ownership of the damaged tree and the respondent had maliciously cut the appellant's tree.

He further added that, the respondent failed to cross examine the

appellant on those aspect of ownership which amounts to concession as so held in the case of **Emanuel Lohay & another v. Republic** Criminal Appeal No. 278 of 2010 Court of Appeal (unreported) making reference to the case of **Masoud Charles Mwahalende & another v. Silas Mbembela**, PC Criminal Appeal No. 2 of 2022 (unreported).

It was Mr. Jackson's contention that, the parties did not claim for ownership of the said land, rather the evidence adduced was aimed at proving ownership of the tree. He therefore argued district court had wrongly interpreted the law.

Submitting on the second ground, Mr. Jackson was of the view that, the district court had misdirected itself on the offence at hand and ended up introducing the offence of land trespass. He added that, the district court made wrong inference against the evidence on record. He thus prayed this appeal be allowed, the decision of the district court be reversed and upheld the decision of the trial court.

On reply submission written by Abdallah Kilobwa the learned advocate, only engaged for drafting the submission for the respondent; he submitted that, the parcel of land on which the tree was cut belongs to the respondent and not the appellant.

Mr. Kilombwa was firm that no land dispute has been resolved between parties to this matter. He added that, there was no proof that the appellant is the lawful owner of the parcel of land where the tree was planted.

To fortify his point, he cited the case of **Julius Malobo v. Revocatus Msiba & another** which does not favour the appellant, because the alleged tree was not in the appellant's property, but he had forcefully cut the said tree which was planted on the respondent's land. Mr. Kilobwa was therefore in agreement with findings of the trial court.

Submitting on the second ground Mr. Kilobwa contended that, the appellant claimed for a tree which is not on his parcel of land. He thus prayed this appeal be dismissed for lacking merits.

On a brief rejoinder Mr. Jackson reiterated his submission in chief and further averred that, the circumstance surrounding the matter at hand it is not necessary on the proof of ownership of the tree being on the land upon which the tree was planted.

He went further to state the land with the tree was previously owned by the father of the parties in this case and later on the allocation of the said land was made between them. He also stated that,

the appellant's tree fell on the portion of land of the respondent. To conclude he maintained his arguments made in his submission in chief.

Having gone through the parties' rival submission, the records of the two courts below and petition of appeal, the sole issue for my determination is whether the appeal has merits.

This being the second appeal, this court may only interfere with the finding of fact if it is satisfied that there was misapprehension of the evidence or if there is violation of some principles of law or procedure. See cases of **Emmanuel Mwaluko Kanyusi and 4 Others**, Consolidated Criminal Appeals No. 110 of 2019 (both unreported) and **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R 149. Also, in the case **Wankuru Mwita v. Republic**, Criminal Appeal No. 19 of 2012, the Court of Appeal held that:

"The law is well settled that on second appeal, the Court will not readily disturb concurrent findings by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-

direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

In the instant matter, this court is called to scrutinize the record of the two courts below to see if there was any non-direction, misdirection of the evidence or violation of some principles of law or procedure that had occasioned miscarriage of justice. In so doing I will determine the two grounds of appeal jointly.

According to available record, in this case the centre of the dispute is the tree alleged to have been cut by the respondent. Each side claiming lawful ownership of the said tree. As the appellant claimed to have planted the said tree in the year 1994 while the respondent claimed to have planted the same tree in 2001.

This court in those grounds of appeal had to address the issue as to whether the offence against the respondent was proved beyond reasonable doubt.

In determining so, it is essential that all four elements of the offence must be proved as pointed out in the case cited by Mr. Jackson of **Julius Malobo v. Revocatus Msiba & another** (supra). Those

elements must be cumulatively proved.

Having considered that in the instant matter there is no dispute that there was a tree (property) which was cut down by the respondent who was the accused person before the trial court. Therefore, the element of property destruction by the respondent has been established.

The other two are; the ownership of the property in question and if the damage was actuated by malice, these are essential elements to be proved. Considering that each party on this case claim to be the lawful owner of the said tree.

On the record available, the trial court was satisfied that tree in question belonged to the appellant basing on the valuation report and oral testimony of the appellant. On the other hand, the district court was of the different view that, the question of land ownership was not resolved, therefore the matter ought to have been referred to the land tribunals for determination.

It is no doubt that, the question of ownership of the land was paramount in order to establish the offence of malicious damage to property. There was argument by Mr. Jackson that the issue of land ownership has been resolved, but his argument is contradicting as he

claimed the appellant did not own the tree but it fell on the land owned by another relative.

It is clear that no evidence was tendered by either party before the trial court to prove ownership of the said land through the decision of the tribunal vested with jurisdiction to determine land matters or by tendering relevant documents of ownerships. However, it has been gathered from the admission made that, the land did not belong to the appellant, but the appellant only claimed ownership of the tree.

Rightly as pointed out by the district court the question could be resolved by either determining who is the lawful owner of the parcel of land on which the tree was planted; since it is the principle that whatever is attached to the land forms part of the land. Therefore, there has to be evidence to establish who actually is the lawful owner of the land.

In the instant matter, I have gone through the trial court's record the appellant claimed that he had planted the said tree on the farm owned by one Lauriani Malkiadi. For unexplained reasons the said Lauriani Malkiadi was never called to testify.

On the other hand, the respondent claimed that he is the one who planted the said tree and he was issued with a permit to cut the said tree but this evidence was not cross examined. It is the trite principle that failure to cross examine a witness on an important matter amount to acceptance of the truth of evidence of that witness - See for example the cases of **Damian Luhehe v. Republic**, Criminal Appeal No. 501 of 2007 and **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (all unreported).

It follows therefore that the offence of malicious damage to property could not be established if the issue of ownership of the land was not resolved, so as to ascertain the owner of the tree in disputes.

That being the case the district court rightly quashed and set aside the decision of the trial court. It is for that reason I find the instant appeal lacking in merits and the same is accordingly dismissed.

I have noted that the respondent was sentenced to pay a fine of Tsh. 50,000/= and on default he was to serve five months' imprisonment. The respondent paid the fine as evidenced by exchequer receipt with number 25479734. I order that the said sum be refunded to him.

It is so ordered.

Dated at Babati this 11th May 2023.



G. N. BARTHY.

JUDGE

Delivered in the presence of presence of the respondent in person and
in the absence of the appellant and his advocate.